(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: AUG 2 8 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. Subsequently, the petitioner filed a motion to reopen and reconsider. The AAO dismissed the motion to reconsider, granted the motion to reopen, and affirmed its prior decision. The petitioner filed a second motion to reopen. The AAO granted the motion and affirmed the dismissal of the appeal. The matter is now before the AAO again on a third motion to reopen. The motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(1)(iii)(C), 103.5(a)(2), and 103.5(a)(4).

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences and as a member of the professions holding an advanced degree. According to parts 5 and 6 of the Form I-140, Immigrant Petition for Alien Worker, the petitioner identified his intended occupation as "physician," and his job title as "physician, surgeon, osteopath." After training at East Tennessee State University (ETSU), Johnson City, the petitioner began his current employment at The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualified for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement;

they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The director found that the petitioner's work as a physician in the field of medical oncology was in an area of substantial intrinsic merit. However, the director, in denying the petition, determined that the petitioner had not established that the benefit arising from his intended future employment would be national in scope. The director concluded that the petitioner's "impact will be limited to the hospital in which he will practice; therefore, the benefit of his skills will be limited to a small area." The director also determined that the petitioner had not established that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The AAO has upheld the director's findings three previous times.

In the December 27, 2012 dismissal of the petitioner's motion, the AAO determined the petitioner had failed to establish that he is engaged in ongoing medical research, and that the AAO reached incorrect conclusions in its past decisions.

On motion, the petitioner submits a letter from counsel and a January 11, 2013 letter of support from Counsel asserts that the letter of support from shows that the petitioner's work is national in scope and that the national interest would be adversely affected if alien employment certification were required for the petitioner.

states:

> I am writing on the behalf of [the petitioner] who has been an essential leader in the medical oncology cancer research program in Ottumwa, Iowa. [The petitioner] is the Senior Investigator for the supervising multiple clinical trials sponsored by several national cancer research base cooperative groups. This is part of a large research network which I supervise as the ([The petitioner] has been a necessary component and a very positive influence on the entire local community. I fully support his application to receive a green card/permanent resident status.

asserts that the petitioner is "a necessary component" of a "large research network" in Iowa and that the petitioner has been a "positive influence on the entire local community," but fails to explain how the petitioner's influence or impact as a cancer researcher is national in scope. does not point to specific research findings by the petitioner indicating that his original work has had, or will continue to have, an impact beyond the . In addition, fails to provide specific examples of how the petitioner's research findings have influenced the field as a whole. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *NYSDOT* at 219, n.6.

The petitioner has not established that his past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that his influence be national in scope. *NYSDOT* at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole."). On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

Furthermore, a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). In addition, the petitioner has failed to explain why the evidence was previously unavailable and could not have been submitted earlier. Prior to filing his three motions, the petitioner had been afforded multiple different opportunities to submit evidence demonstrating his eligibility: at the time of the original filing of the petition, in response to the director's request for evidence, and at the time of the filing of the appeal. A review of the evidence that the petitioner submits on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2) and, therefore, cannot be considered a proper basis for a motion to reopen. Moreover, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). While the second factor set forth in *NYSDOT* requires the petitioner to demonstrate that the proposed benefits of his work will be national in scope, projects that come to fruition after the petition's filing date fail to establish his elibility as of that date. Lastly, the instant motion does not contain the statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding as required by the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C). For this additional reason, the motion must be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(4) states that "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is dismissed, the AAO's December 27, 2012 decision is affirmed, and the petition remains denied.

[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." WEBSTER'S NEW COLLEGE DICTIONARY, (3d Ed 2008). (Emphasis in original).